SC 92961

IN THE MISSOURI SUPREME COURT

LINCOLN SMITH, ET AL., Appellants-Respondents

v.

BROWN & WILLIAMSON TOBACCO CORP., Respondent-Appellant

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Marco Roldan

SUBSTITUTE REPLY AND CROSS-RESPONDENTS BRIEF OF APPELLANTS-RESPONDENTS SMITH

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ATTORNEYS FOR APPELLANTS-RESPONDENTS SMITH

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Statement of the Issues

With respect to the Smiths' appeal, the trial court's judgment should be reversed because: 1) the trial court exceeded the scope of the appellate court's prior mandate; and 2) the trial court erred in denying the Smiths' motion for new trial based on intentional juror nondisclosure of material issues called for during voir dire. The appellate court reversed and remanded for a new trial on the amount of punitive damages only. The appellate court found that as there was no error asserted by either party in phase I of the bifurcated punitive damages trial, the scope of the reversal would be limited to a new trial on the amount of punitive damages. This relief is appropriate as appellate courts have wide discretion, pursuant to long-standing statutory, rule and common law precedent to reverse and remand for a new trial on some or all issues or to give such relief as the trial court ought to give in order to finally dispose of the case.

As to the cross-appeal, Brown & Williamson is not entitled to a JNOV under either of its points on appeal by virtue of law of the case, as both points were raised and expressly rejected in the prior appeal, and both are unsupported by the record under the relevant standard of review. Twice the appellate court has provided detailed factual and legal support for rejection of Brown & Williamson's claims that: 1) plaintiffs failed to make a submissible case for punitive damages based on the same conduct for which the first jury found it liable for strict liability

product defect; and 2) plaintiffs' claims are barred by implied preemption. Brown & Williamson's points on appeal should be summarily denied.

The Smith's Reply Argument

The trial court violated law of the case and the scope of the appellate court's prior mandate in permitting evidence of non-party R.J. Reynolds during phase II of the punitive damage trial (addressing point I of the Smiths' appeal)

The relevant issue before this court is not whether the trial court abused its discretion in admitting particular evidence. Instead, it is whether the trial court exceeded the scope of the appellate court's prior mandate and limited remand by permitting Brown & Williamson, for the first time during the limited retrial, to attempt to avoid the imposition of an amount of punitive damages by adducing evidence of the merger and conduct of non-party R.J. Reynolds. The retrial on punitive damages must be based on *the same conduct of the same defendant* from the prior trial that established the underlying strict liability product defect upon which the punitive damages claim rests. As the trial court exceeded the scope of the appellate court's prior mandate and limited remand, relief is warranted.

In the 2005 trial, Brown & Williamson defended the Smiths' claims for actual and punitive damages with evidence of Brown & Williamson only, even though in 2004 Brown & Williamson had merged with R.J. Reynolds. In the prior trial, Brown & Williamson chose a strategy to object to any evidence of the prior merger, which included any evidence of the actions or financial condition of non-

party R.J. Reynolds as relates to the claims for actual and punitive damages. (L.F. 1120, 1121; 2005 trial transcript at 35-38.) The appellate court affirmed the jury's verdict against Brown & Williamson finding Brown & Williamson liable for strict liability product defect product defect, again, based *solely* on the conduct of Brown & Williamson. *Smith, et al. v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 790-794 (Mo.App. 2009) ("*Smith I*"). The appellate court reversed for a new jury to determine whether the conduct of Brown & Williamson, that gave rise to the affirmed finding of strict liability product defect, was reckless and indifferent sufficient to impose punitive damage liability, and if so, what amount of punitive damages should be awarded. *Id.*, at 822-823.

There is no independent cause of action for punitive damages; instead, it must be brought in conjunction with a claim for actual damages. *Klein v. General Elec. Co.*, 728 S.W.2d 670 (Mo.App. 1987). In this case, the punitive damages liability is directly and necessarily tied to the underlying strict liability product defect jury verdict previously affirmed by the appellate court. The trial court violated the scope of the appellate court's mandate when it permitted Brown & Williamson to abruptly change its defense to the imposition of an amount of punitive damages by adducing evidence and arguing that this jury should not punish R.J. Reynolds for the past actions of a company that does not exist anymore and for actions that R.J. Reynolds did not do.

In the underlying appeal, the appellate court was in the unique position of interpreting what it intended in *Smith I* when it affirmed the jury's verdict against Brown & Williamson on the issues of liability and compensatory damages for strict liability product defect and reversed for a new trial on the limited issues of whether Brown & Williamson was liable for punitive damages on the strict liability product defect claim. In the underlying appeal the court found:

> In remanding the case for retrial of the issue of punitive damages; we clearly contemplated that the identity of the defendant in the first and second phases of trial would again be B & W, the party found liable for strict liability product defect in the affirmed portion of the first trial. Our mandate required that the jury on remand determine if punitive damages should be awarded **against B & W** on the strict liability product defect claim and to then determine how much, if any, punitive damages to assess **against B & W** related to that claim. *Smith v. Brown & Williamson*, 2012 WL 4497553 (October 2, 2012) at *6 (original emphasis) ("*Smith II*").

The appellate court's decision was well grounded in fact and law. *Pope v. Ray*, 298 S.W.3d 53, 58 (Mo.App. 2009), *Brooks v. Kunz*, 637 S.W.2d 135, 136-38 (Mo.App. E.D. 1982), *Langdon v. Koch*, 435 S.W.2d 730 (Mo.App. 1968), *Walton v. City of Berkeley*, 223 S.W.3d 126, 129 (Mo. banc 2007) and *Williams v. Kimes*, 25 S.W.3d 150, 154 (Mo. banc 2000). These cases are dispositive on the issue before this court.

Pope is particularly relevant because the respondent in that case advanced what amounted to be a new theory of liability, though couched as an argument for an award of damages, which was outside the appellate court's mandate and limited remand for a new trial on damages only. *Pope*, 298 S.W.3d at 58. In *Pope v. Pope*, 179 S.W.3d 442 (Mo.App. 2005), the appellate court, en banc, reversed the trial court's prior judgment entered on a jury verdict against Dr. Ray and issued a limited remand for a new trial on damages only. The appellate court found the $5 million jury verdict to be excessive.

Following the remand, the trial court entered summary judgment against Dr. Ray for $8 million past and future noneconomic damages plus $11 million prejudgment interest. Rather than follow the appellate court's opinion and mandate directing a new jury trial to occur on the issue of Pope's damages, the trial court determined as a matter of law that Pope's damages had been previously established in a 2004 arbitration between Pope and the defendant ad litem for Strnad.

The appellate court found in the 2009 *Pope* opinion that the trial court exceeded the scope of the appellate court's mandate and limited remand. The appellate court noted that the arbitration award existed at the time of the 2005 appeal and plaintiff could have brought the issue of whether Dr. Ray should be held liable for that award during the appeal. However, plaintiff took a different position and the appellate court held that changing her position at the later trial was improper. "Judicial economy is not advanced by allowing respondent to 'reserve'

issues omitted from their original appeals to be decided later." *Pope*, 298 S.W.3d at 58, *quoting*, *Walton*, 223 S.W.3d at 130. *Pope* is dispositive because Brown & Williamson also chose a different strategy in the subsequent limited retrial that is barred by law of the case and the appellate court's prior mandate. *Pope* is also dispositive because on a limited remand for a new trial on damages only, a party was improperly permitted to adduce a new liability issue.

In the underlying appeal, the appellate court correctly concluded that during the second phase of the retrial, the trial court improperly allowed Brown & Williamson to present evidence related to non-party R.J. Reynolds Tobacco, which had assumed responsibility for Brown & Williamson liabilities as part of a corporate transaction that occurred before the first trial. The appellate court found that Brown & Williamson's defense consisted of extensive evidence of R.J. Reynold's historical corporate citizenship and research and marketing efforts to reduce the negative effects of its products and arguing that any punitive damages award would be paid by R.J. Reynolds.

> Neither this line of defense nor any of the evidence used to support it were presented at the first trial, and none of the parties challenged the exclusion of this evidence by the trial court in the original trial. By allowing this evidence and argument related to R.J. Reynolds to be used as a defense in the second trial, the trial court allowed B & W to effectively substitute defendants and to argue that non-party R. J. Reynolds should not have to

pay punitive damages. Such evidence and argument were clearly beyond this Court's mandate and inconsistent with Section 510.263.3.

Smith, WL 4497553 at *7.

Brown & Williamson's argument that the Smiths failed to object and preserve any relevance objection to the R.J. Reynolds evidence was expressly rejected by the appellate court:

> With regard to preservation of their objection to any evidence related to R.J. Reynolds, and, prior to closing argument, B & W expressly stipulated that the Smiths' claim that the admission of evidence and argument related to R.J. Reynolds exceeded the scope of the prior mandate was properly preserved for appeal. Both parties acknowledged at oral argument that the issue of admitting evidence about R.J. Reynolds was discussed throughout the course of the trial and was repeatedly objected to by the Smiths. R.J. Reynolds stipulation at trial forecloses it from making a preservation challenge on appeal.

Smith, 2012 WL 4497553 at *10. The court's findings are supported by the record. (Tr. 59, 60, 2755, 3320.) The appellate court also correctly rejected any argument of waiver:

> As to waiver, in addition to granting a continuing objection, prior to the start of the second phase of the trial on remand, the trial court ordered that the record reflect that the Smiths were not waiving their claim that the

> admission of new evidence was improper even though the Smiths would be arguing about and introducing new evidence. R.J. Reynolds offered no objection or comment at that time. The record does not reflect any intent by the Smiths to waive their right to challenge the admission of the R.J. Reynolds evidence. Indeed, they repeatedly voiced their objections at every phase of retrial. There was no waiver.

Id. The appellate court's findings are supported by the record. (Tr. 59, 60, 2755, 3320.)

Brown & Williamson's cases do not support relief. They address the general proposition that a specific objection must be made to evidence or issues relating to the error in the admission or it is waived. *State v. Mickle*, 164 S.W.3d 33 (Mo.App. 2005), *Bowls v. Scarborough*, 950 S.W.2d 691 (Mo.App. 1997) and *Anderson v. Rojanasathit*, 714 S.W.2d 894 (Mo.App. 1986) all pertain to a party on a *first trial*, asserting error in the trial court's discretion in the admission of particular evidence, such as a prior conviction, drug use, or conversations.

These cases addressing the trial court's discretion in the admission of evidence and whether the complaining party waives any assertion of error by admitting the evidence first have no application to the issue before this court. The relevant issue before this court is whether the trial court exceeded the scope of the appellate court's mandate and limited remand. Brown & Williamson's attempt to

cast the issue as one of preservation of evidentiary error and alleged waiver is misplaced.

Brown & Williamson's reliance upon *Maugh v. Chrysler Corp.*, 818 S.W.2d 658 (Mo.App. 1991) is also misplaced. Brown & Williamson cites *Maugh* for the proposition that "defendant's actions following conduct that formed the basis for liability are relevant to a punitive damages determination." (Respondent's Substitute brief at 44.) However, during phase two, Brown & Williamson did not adduce any evidence of its actions. Instead, the only evidence it adduced was of R. J. Reynolds. (Tr. 2764-2943, 2963-2964, 3119-3177, 3190-3257.) Brown & Williamson argued that it no longer existed and no punitive damages should be awarded against R.J. Reynolds. Its attempt to avoid the imposition of any punitive damages is evident through the following excerpt from its closing argument:

> Well, as I've said several times during this case, this is really a very unusual case. And one of the things that's unusual about it is that Brown & Williamson Tobacco Company doesn't exist anymore. There is no Brown & Williamson Tobacco Company. R.J. Reynolds Tobacco Company exists now. R.J. Reynolds Tobacco Company is responsible for paying any punitive damage award in this case. Mr. Adams explained that to you yesterday. There is no Brown & Williamson Tobacco Company to deter. It's only R. J. Reynolds.

And don't get me wrong. Reynolds is legally responsible for Brown & Williamson's liabilities. I'm not arguing that point. But the fact of the matter is, the company in these instructions doesn't exist anymore…

I suggest to you that the way to think about the punishment issue is this: Should R.J. Reynolds Tobacco Company pay punitive damages in 2009 to punish the company for Brown & Williamson's conduct prior to 1990? That's really the question before you…

Now, the fact of the matter is, I'm not challenging the first verdict in any way. I recognize that Brown & Williamson hasn't been a perfect company and that some mistakes were made at Brown & Williamson. There were things written in those documents that never should have been written…But that happened a long time ago. Those are documents from the fifties, sixties, and seventies. That's not where we are today. We're in 2009. And you're being asked to punish R.J. Reynolds Tobacco Company in 2009 for these statements in Brown & Williamson documents 20, 30, 40 and 50 years ago…So, let's keep in mind, it's R.J. Reynolds Tobacco Company that really is front and center in this case at this point in time.

Well, let's talk a little bit about whether it's fair to punish R.J. Reynolds Tobacco Company for what Brown & Williamson did in the past. You know, like you may have felt that Brown & Williamson said some things that they shouldn't have said or did some things that they shouldn't

have done, but that's all really in the distant past at this point. The executives from the fifties, sixties, seventies, and eighties, they're all gone…

So as I said, the question for you really is: Should RJRT pay punitive damages in 2009 to punish the company for Brown & Williamson's conduct prior to 1990?...

Let's turn to the next question. Which is the deterrence issue in this case. The question of: Are punitive damages needed to deter R.J. Reynolds Tobacco Company from conduct like that you based your first verdict on? Because that's the issue. There is no Brown & Williamson to deter. So this is whether or not R.J. Reynolds needs changed….

There's nothing about your first verdict that obligates you to award any punitive damages in this case. So any suggestion that you're only here to decide how much is wrong. You can still write "none" if you don't think that one of the purposes of punitive damages will be accomplished by awarding punitive….So I want to suggest to you that the right thing to do in this case is to decide that the world leader in trying to develop lower-risk tobacco products doesn't need to be punished. They're the wrong company to punish…you ought to write in the word "none," and bring this case to an end….if you're going to award punitive damages…anything above a

million and a half dollars isn't fair, isn't reasonable, isn't reasonably related to the underlying compensatory award… (Tr. 3349-3375.)

The appellate court's limited remand for a new trial on the amount of punitive damages only is not in conflict with statutes, rules or prior cases

Brown & Williamson fails to demonstrate how the appellate court's relief was improper. There was no error asserted by either party as to phase I of the punitive damages retrial. Section 510.330 R.S.Mo. has given trial and appellate court's the right to grant a new trial on limited issues since 1945. *Lilly v. Boswell*, 242 S.W.2d 73, 78 (Mo. 1951). Missouri Rules of Civil Procedure 78.01 and 84.14 are consistent in giving courts discretion to award a new trial on damages only and this wide discretion has been recognized as appropriate when relief is for a new trial on punitive damages only. *McCrainey v. Kansas City Missouri School Dist*., 337 S.W.3d 746, 755, 756 (Mo.App. 2011). None of the cases cited by Brown & Williamson find to the contrary, and its argument that Section 510.263 R.S.Mo. supersedes or invalidates Section 510.330, Rules 78.01 and 84.14 is unpersuasive and legally unsupported. *Lilly*, 242 S.W.2d at 78; *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989).

In this case, limited relief is warranted because there was no error in the manner of how phase I of the punitive damages retrial was conducted. The Smiths have *twice* proved a submissible case on punitive damages based on the same conduct for which the first jury found Brown & Williamson liable for strict

liability product defect. This court has wide discretion to afford appropriate relief and to recognize the important principles of judicial economy. This case was originally tried in 2005 and again in 2009. Brown & Williamson fails to provide a meaningful authority requiring the Smiths to prove for a *third* time that Brown & Williamson is liable for punitive damages, particularly when it does not assert any error occurred in the first phase of the retrial. This court has wide discretion to award relief including the grant of a new trial on the amount of punitive damages only or to remand this case to the appellate court for it to determine whether the original $20,000,000 punitive verdict comports with the constitutional principles previously briefed by the parties but not reached by the appellate court in its 2009 opinion; or whatever just relief this court deems appropriate pursuant to its wide discretion afforded under the law. Rule 84.14.

The trial court erred in denying the Smiths' motion for new trial on the basis of juror intentional nondisclosure (addressing point II)

The Smiths are entitled to a new trial because Juror Mackison intentionally did not disclose material information revealing whether he had predetermined opinions, biases or prejudices against tobacco litigation. Brown & Williamson argues that the Smiths waived this issue by not including in their post-trial motion the fact that juror Mackison failed to reveal his mother suffered from smoking-related lung disease. Again Brown & Williamson misses the point. The Smiths' voir dire centered on, whether any panel members were biased or prejudiced

against tobacco litigation. Questions designed to elicit biases and prejudices included whether any on the panel had experience with smoking, whether any or their family members suffered from lung problems, and whether any considered tobacco cases frivolous. The Smiths preserved this issue in their post-trial motion and under a relevant factual and legal analysis, they are entitled to a new trial.

Voir dire was extensive. (Tr. 75-851.) Repeatedly, the panel members interchangeably linked the issues of smoking, choice, and lung problems with whether they were biased or prejudiced. The record reveals that many panel members who considered tobacco cases to be frivolous based their opinions upon their underlying experiences and opinions regarding smoking, choice, and lung problems associated with smoking. (Tr. 92-336.) Despite fellow panel members repeatedly discussing these issues in detail, Mackison sat silent never revealing that his mother, a long-time smoker, had lung problems and that he considered this case to be frivolous.

A close review of Brown & Williamson's brief reveals that it does not dispute: 1) the questions asked were clear; 2) the questions sought disclosure of information material to the issues in this case; 3) the Smiths' motion raises and preserves the issue of juror nondisclosure of strong bias and prejudice against tobacco litigation, including whether any felt this case was frivolous; and, 4) prejudice is inferred when jurors intentionally do not disclose material information in answer to clear questions.

Brown & Williamson argues that the Smiths did not preserve the issue of nondisclosure of anyone on the panel or a family member suffering from lung disease. They cite *State ex rel. Mo. Highway and Transp. Comm'n v. Christie*, 855 S.W.2d 380 (Mo.App. 1993), *Nash v. Ozark Barbeque, Inc*., 901 S.W.2d 353 (Mo.App. 1995), *Heinen v. Healthline Management Inc*., 982 S.W.2d 244 (Mo. banc 1998) and *Wingate by Carlisle v. Lester E. Cox Medical Center*, 853 S.W.2d 912 (Mo. banc 1993), but these cases are not dispositive on the issue raised by the Smiths. The Smiths properly raised in their post-trial motions the issue that jurors had intentionally not disclosed material issues specifically requested during voir dire that disclosed their strong biases and prejudices against tobacco litigation. (L.F. 1088-1191.)

The relevant issue is not whether the Smiths' post-trial motion listed the specific issue of whether Mackison's mother had smoking-related lung problems. Instead, the issue that needed to be and was preserved was whether Mackison intentionally did not disclose material information called for during voir dire that revealed he was biased and prejudiced against tobacco litigation. Questions asked during voir dire about family members with lung issues or whether any felt the case was frivolous were asked in an attempt to reveal panel members' biases and prejudices against tobacco litigation.

This jury was not to determine any issues relating to the deceased's lung problems and whether those were the result of smoking. Complete and honest

disclosure from the venire panel was critical in this case where the issue was limited only to whether punitive damages should be awarded against a tobacco company in a wrongful death case brought by the family of a woman who had smoked for decades.

The following cases support the Smiths' requested relief: *Williams by Wilford v. Barnes Hospital*, 736 S.W.2d 33 (Mo. banc 1987); *Strickland by and through Carpenter v. Tegeler*, 765 S.W.2d 726 (Mo.App. 1989); *Massey v. Carter*, 238 S.W.3d 198 (Mo.App. 2007); *Overlap, Inc. v. A.G. Edwards & Sons*, 318 S.W.3d 219 (Mo.App. 2010) and *Beggs v. Universal C.I.T. Credit Corp*., 387 S.W.2d 499 (Mo. banc 1965). *Williams* and *Strickland* are particularly dispositive.

In *Strickland*, the juror was able to remember that her husband had a nephew and niece who each had an arm deformity from birth when the jury deliberated, but said she did not remember this fact during voir dire. Numerous panel members responded to questions asked whether any member of their immediate family having limitation of motion of their arm or any extremities. The court found that a response from the juror was called for and her explanation that she did not remember the nephew and niece at the time of the questions taxed this court's credulity. *Strickland*, 765 S.W.2d at 728.

In *Williams*, the nondisclosure involved a juror signed the verdict and failed to disclose that he had settled a claim for personal injury. The juror said he did not recall the claim when questioned during voir dire, but when he testified at the

hearing, he remembered the accident in detail. The court found that under those circumstances, the juror's explanation that he forgot his personal injury claim unduly taxed the court's credulity. *Williams*, 736 S.W.2d at 38. Mackison's explanation for his nondisclosure is equally incredible and unbelievable.

Brown & Williamson argues that there is no direct evidence that Mackison intentionally failed to disclose that he felt the case was frivolous or that his mother had lung issues. *Strickland* is dispositive on these issues too. In *Strickland*, the party opposing the new trial argued that because the juror said she did not remember the nephew and niece during voir dire, it cannot be established that she actually remembered them. This court rejected this argument: "Obviously, to sustain this argument would be to hold that a juror could never be found to have intentionally concealed a fact if the juror followed with the simple expedient that certain facts were not remembered at the time a question was asked. Such is not the law." *Id*., at 729.

The appellate court held that there was no reasonable inability of the juror to comprehend the information solicited as to whether any family member suffered from the same medical condition at issue in the case. "In view of the arm deformity from birth on the part of the nephew and niece which caused them to carry one arm at their side, and in light of the fact that Jones had known the nephew and niece for almost 50 years and had seem them 'a lot of times' her purported forgetfulness is unreasonable. It follows from this conclusion that her

failure to disclose the arm deformity of the nephew and niece was intentional." *Id*. The court concluded that as *Williams* has held that "a finding of intentional concealment has 'become tantamount to a per se rule mandating a new trial'" on finding that the concealment was intentional, it followed that bias and prejudice must be presumed to have influenced the verdict. *Id*.

Mackison's stubborn refusal to answer the questions asked during voir dire and during the post-trial hearing is equally unreasonable and intentionally concealing. (Tr. 3423-3433.) His nondisclosure was intentional. Prejudice is presumed and the Smiths are entitled to a new trial. *Williams*, 736 S.W.2d at 37, 38. Reversal is warranted.

Cross-Respondents' Argument

The trial court properly denied Brown & Williamson's motion for JNOV

(addressing point I of Brown & Williamson's brief)

Brown & Williamson argues it is entitled to JNOV because the Smiths did not present clear and convincing evidence of aggravating circumstances based on the same conduct for which the first jury found Brown & Williamson liable for strict liability product defect. This point is without merit. The appellate court gave detailed factual findings in its prior opinion rejecting the same argument, *Smith*, 275 S.W.3d at 790-796, 812-824 ("*Smith I*") that now constitutes law of the case. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128, 129 (Mo. banc 2007). The appellate court gave equally detailed factual findings in the appeal following the

retrial, again rejecting Brown & Williamson's argument. *Smith*, 2012 WL 449553 at *1-4 ("*Smith II*").

Twice the appellate court has expressly rejected Brown & Williamson's argument that plaintiffs Smith have not presented anything more than a categorical attack on cigarettes. *Smith*, 275 S.W.3d at 790-796, 812-824; *Smith* 2012 WL 449553 at *1-4. Twice the appellate court has reviewed the evidence adduced under the correct standard of review and found that plaintiffs Smith made a submissible case for punitive damages for strict liability product defect. *Smith*, 275 S.W.3d at 822-824; *Smith* 2012 WL 449553 at *1-4. Brown & Williamson's request for JNOV should be summarily denied.

Following the appellate court's remand, the trial court entered an order that the evidence to be presented in the first phase of the punitive damages trial "is limited to the evidence presented in the first trial." (L.F. 58, 59.) The Smiths presented the same evidence in the retrial because the appellate court had already affirmed the jury verdict in their favor on strict liability product defect and described what evidence was sufficient to make a submissible case for punitive damages based upon that claim. *Smith*, 275 S.W.3d at 791-805, 810-823.

There was no reason for the Smiths to deviate in the retrial. Though they did not have to prove Brown & Williamson's liability for strict liability product defect, they presented the same evidence in the context of proving the knowledge and conduct of Brown & Williamson in exhibiting reckless and conscious

disregard toward the safety of others sufficient to support their claim for punitive damages. (Tr. 982-990, 1009-1390, 1458, 1459, 1482-1960, 1985, 1986; Exh. 3, 10, 48, 270, 407.) Brown & Williamson has not appealed the alleged inadmissibility of any of the evidence adduced during the retrial and its reliance upon certain isolated statements from the record are inappropriate to support a request for JNOV. *Smith*, 275 S.W.3d at 794.

In affirming the prior jury verdict finding strict liability product defect, the appellate court gave detailed findings of the evidence that supported the jury's verdict on strict liability product defect. *Smith*, 275 S.W.3d at 795-796 (describing in detail the testimony of Dr. Wigand and Dr. Burns). This same evidence was adduced at the retrial. (Tr. 982-990, 1009-1390, 1458, 1459, 1482-1960, 1985, 1986; Exh. 3, 10, 48, 270, 407.) The appellate court gave detailed factual findings on the evidence that supports the submission of punitive damages based on the strict liability product defect claim (detailing relevant exhibits and testimony from Dr. Wigand and Dr. Burns). *Smith*, 275 S.W.3d at 810-823. The Smiths adduced the same evidence at the retrial. (Tr. 982-990, 1009-1390, 1458, 1459, 1482-1960, 1985, 1986; Exh. 3, 10, 48, 270, 407.) Dr. Burns and Dr. Wigand testified for over 860 pages on the issues they had previously testified to in front of the prior jury and they provided their opinions that Brown & Williamson's knowledge and conduct was reckless and consciously indifferent. (Tr. 982-990, 1009-1390, 1458,

1459, 1482-1960, 1985, 1986.) Brown & Williamson's point is not supported by the record and should be denied.

Dr. David Burns told the jury in the retrial what he had testified to in the prior trial, including that Kool cigarettes were defective and unreasonably dangerous. (Tr. 989, 990, 1193, 1194.) He testified regarding the distinctive characteristics of Kool cigarettes, including the unique blend, the presence of menthol and the high level of menthol. (Tr. 1084-1088, 1157-1163, 1218, 1219.) He testified extensively about Brown & Williamson's knowledge and conduct regarding the design, manufacture, advertising and public position it took on the denial that its cigarettes are addictive or cause disease. (Tr. 1032-1070; 1082-1126.) He explained to the jury that Brown & Williamson's knowledge and conduct over the past decades of the dangerous and addictive qualities of its cigarettes was "one of the largest public health frauds that occurred in the last half century." (L.F. 1082-1093.) He explained that this conduct:

> "…is a very clear example of a tobacco company attempting to sell its products to someone who is already sick, and that product is going to add further harm to that individual who is already sick. So it's a conscious and deliberate effort to increase profits at the expense and injury of the individual who responds to this message." (Tr. 1108.)

Dr. Wigand testified regarding in both trials about while he worked at Brown & Williamson, the president had a favorite saying of "hook 'em young,

hook 'em for life" and the hook referred to nicotine addiction. (Tr. 1580-1582.) He described how he was trained not to write anything down that could be potentially used in litigation and an attorney followed him around so that the conversations he had would be privileged. He also testified about how minutes from meetings were sanitized to take out any information harmful to Brown & Williamson's interests. (Tr. 1510-1616, 1618-1644.) He testified regarding the distinctive characteristics of Kool cigarettes, including the high level of nicotine combined with menthol that ameliorated the harshness and allowed the smoker to breathe the smoke in and breathe deeper into the lungs. (Tr. 1606-1616.)

These are just a few examples of the detailed record made through testimony and exhibits to support the Smiths' claim for punitive damages, consistent with this court's prior findings. Brown & Williamson's assertion that a few sentences taken from this voluminous record entitle it to JNOV does not withstand scrutiny. Its request for relief should be denied.

In the body of the argument, Brown and Williamson advances the additional arguments that the trial court erred in permitting the Smiths to adduce evidence relevant to claims no longer in the case and as a result it failed to comport with the appellate court's prior opinion or due process. However, the arguments that evidence was adduced in violation of the appellate court's mandate or due process are not preserved in the point relied on and cannot support relief. *Giles v. Riverside Tranport, Inc.*, 266 S.W.3d 290, 298 (Mo.App. 2008) (arguments raised

in the argument portion of the brief only and not included in the point relied on are not preserved for appeal); *Pearman v. Department of Social Services*, 48 S.W.3d 54, 55 (Mo.App. 2001) (errors raised for the first time in the argument section and that are not raised in the point relied on are not preserved for appeal).

Furthermore, the trial court repeatedly ruled that either Brown & Williamson did not object to the admission of evidence on the basis that it did not comport with the appellate court's prior opinion or the evidence was relevant for other reasons, such as to prove Brown & Williamson's knowledge in the context of proving intentional and reckless conduct. (Tr. 48, 891-893, 1134-1136, 1398, 1399.) The record shows that the Smiths followed the appellate court's prior directive in the presentation of their case and Brown & Williamson's request for reversal for entry of JNOV should denied.

The trial court properly denied Brown & Williamson's request for JNOV based on implied preemption (addressing point 2).

Brown & Williamson's point regarding implied preemption should be summarily denied. Twice the appellate court has expressly rejected Brown & Williamson's implied preemption argument. *Smith, et al. v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 798, 799 (Mo.App. 2009); *Smith*, 2012 WL 4497553 at *4. The same argument was also rejected in *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 92-93 (Mo.App. 2006). Law of the case prevents Brown & Williamson from now arguing preemption exists on the

limited issue of the jury's imposition of punitive damages when this court has previously rejected its application to the underlying strict liability product defect product defect claim. *Smith*, 2012 WL 4497553 at *4; *Walton v. City of Berkeley*, 223 S.W.3d 126, 128, 129 (Mo. banc 2007).

Brown & Williamson argues that the appellate court only made a "factual" finding that preemption does not apply. The appellate court rejected his argument. *Smith*, 2012 WL 4497553 at *4. The appellate court's opinion in *Smith I* constituted law of the case for all points presented and decided, as well as matters that arose prior to the first adjudication and that might have been raised but were not. *Walton*, 223 S.W.3d at 128, 129.

Brown & Williamson tries to avoid the law of the case by asserting that the Smiths presented different evidence in the retrial. The appellate court correctly rejected this argument and the evidence shows otherwise. *Smith*, 2012 WL 4497553 at *4. Twice the appellate court has expressly found that the Smiths did more than present evidence that all cigarettes carry the same health risks, and instead demonstrated that Brown & Williamson made specific design choices that had the potential to negatively impact Ms. Smith's health. *Smith*, 275 S.W.3d at 798; *Smith*, 2012 WL 4497553 at *4. The appellate court found, "by the terms of its own argument, the point [of asserting preemption] fails." *Id.* The appellate court went on to conclude in its prior opinion that despite the evidence adduced, state strict liability product defect product defect and negligent design claims are

not preempted. *Id*., at 799; *Thompson*, 207 S.W.3d at 92-93. The Smiths followed the appellate court's findings and directives and presented the same evidence at the retrial. (Tr. 982-990, 1009-1390, 1458, 1459, 1482-1960, 1985, 1986; Exh. 3, 10, 48, 270, 407.)

Brown & Williamson picks a few isolated statements from 11 pages of over 860 pages of testimony and exhibits from Dr. Wigland and Dr. Burns to argue that the Smiths claims are barred by preemption. However, the full record of admitted exhibits and the testimony of Drs. Wigand and Burns show that the Smiths again proved specific design choices by Brown & Williamson that had the potential to affect Ms. Smith's health during the time period she smoked. (Tr. 982-990, 1009-1390, 1458, 1459, 1482-1960, 1985, 1986; Exh. 3, 10, 48, 270, 407.)

Nothing raised in Brown & Williamson's brief warrants review or relief. It does not cite a single case that provides support for its argument that the issue of preemption is subject to re-litigation. Twice the appellate court has given an extensive analysis to Brown & Williamson's preemption argument and rejected it on the evidence adduced and as a matter of law. *Smith*, 275 S.W.3d at 798, 799; *Smith*, 2012 WL 4497553 at *4. Law of the case prevents Brown & Williamson from re-litigating any issue regarding preemption and its claim for JNOV should be denied.

CONCLUSION

This court should reverse and remand in conformity with the appellate court's prior mandate. The intentional concealment by Juror Mackison of material information requested during voir dire that showed his bias and prejudice deprived the Smiths of their constitutional right to a fair and impartial jury. They are entitled to a new trial. Also because the trial court's order permitting Brown & Williamson to offer evidence and pursue a defense not present before the prior jury, the scope of the appellate court's prior mandate was exceeded. The trial court's judgment is null and void and the Smiths are entitled to a new trial on the liability and a determination of the amount of punitive damages; a new trial on the amount of punitive damages only; or to remand this case to the appellate court for it to determine whether the original $20,000,000 punitive verdict comports with the constitutional principles previously briefed by the parties but not reached by the appellate court in its 2009 opinion; or whatever just relief this court deems appropriate pursuant to its wide discretion afforded under law.

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Certificate of Compliance and Service

SUSAN FORD ROBERTSON, of lawful age, first being duly sworn, states upon her oath that on April 12, 2013, she electronically served Substitute Reply and Cross-Respondents Brief of Appellants-Respondents Smith by use of Missouri's electronic filing system to: Mr. Bruce Ryder and Mr. Jason Wheeler, Thompson Coburn, L.L.P., One US Bank Plaza, St. Louis, MO 63101 as counsel for Respondent Brown & Williamson. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 6,862 words, excluding the cover and the certification as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney